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In the Supreme Court of the United States

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09-1497

UNITED STATES OF AMERICA, PETITIONER

V.

LEE ALMANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes the Respondent, Lee Almany, by and through counsel, and moves this Court for an Order allowing him to proceed *In Forma Pauperis* pursuant to Rule of the Supreme Court of the United States 39. In support, the Respondent shows this Court that he is an indigent criminal defendant and that his counsel was appointed by the United States District Court, Eastern District of Tennessee to represent him pursuant to 18 U.S.C. § 3006A (2010).

Respectfully Submitted.

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No. 09-1497

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LEE ALMANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT, LEE ALMANY

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In the Supreme Court of the United States

09-1497

UNITED STATES OF AMERICA, PETITIONER

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MEMORANDUM FOR THE RESPONDENT, LEE ALMANY

Following a guilty plea in the United States District Court for the Eastern District of Tennessee, respondent was convicted of conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. 846, 841(a)(1) and (b)(1)(A), and possessing a firearm in furtherance of that drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). The District Court sentenced respondent to 15 years in prison, 10 years for the cocaine charge, the mandatory minimum in that count, 5 years consecutive on the 924(c) conviction and 5 years supervised release. Pet. App. 1a-2a & n.1. Respondent's appeal was remarkable in that it began with an appeal brief under Anders v. California, 386 U.S.738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) and evolved into a pro se motion raising the issue that is before the court today. Id. 2a. The Sixth Circuit Court of Appeals remanded the case to the District Court for resentencing, stating that the

"except" clause prohibits a court from sentencing a criminal defendant under both the mandatory minimum sentence found in the firearm statute and another, greater, mandatory minimum sentence in any other provision of law. Id. 4a, 7a.

The Sixth Circuit, in remanding the case to the District Court for resentencing, followed the Second Circuit's interpretation of 18 U.S.C. 924(c)(1)(A) in *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008). The statute reads:

> *Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law*, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime-(i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A) (emphasis added).

The Second and Sixth Circuits interpret the "except" clause to exempt a criminal defendant from the mandatory minimum sentences proscribed in 924(c)(1)(A) where that defendant is subject to a greater minimum sentence for the

underlying drug trafficking offense or crime of violence. *United States v. Williams*, 558 F.3d 166 (2d Cir 2009), petition for cert. pending, No. 09-466 (filed Oct. 20, 2009). This issue is squarely before this Court in *Abbott v. United States*, 130 S. Ct. 1284 (No. 09-479) and *Gould v. United States*, 130 S. Ct. 1283 (No. 09-7073), and these cases, as the Court is undoubtedly aware, are set for oral argument on Monday, October 4, 2010.

The Government in its Petition for Writ of Certiorari is actually seeking to have its petition held pending the Court's decision in *Gould* and *Abbott*; therefore Respondent is essentially joining the Government in a vigil as we await the Court's decision in this matter. Respondent urges that the Court give the words "any other" as they appear in 18 U.S.C. § 924(c)(1)(A) the same meaning that this Court gave to the words "any other" in its prior decision, *United States v. Gonzalez*, where this Court stated:

> Read naturally, the word "any" has an expansive meaning, that is "one or some indiscriminately of whatever kind." *Webster's Third New International Dictionary* 97 (1976). Congress did not add any language limiting the breadth of that word, and so we must read § 924(c) as referring to all "terms of imprisonment," including those imposed by state courts.

520 U.S. 1, 5, 117 S. Ct. 1032, 1035, 137 L.Ed. 2d 132 (1997). *Gonzales*, of course, dealt with a different section of 18 U.S.C. § 924(c) which then provided:

> Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with *any other term of imprisonment*, including that imposed for the . . . drug trafficking crime in which the firearm was used or carried.

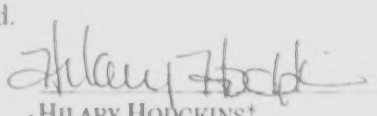
18 U.S.C. § 924(c)(1)(1997) (emphasis added).

In *Gonzales*, the Government argued for an expanded definition of the word "any" so that the prohibition of concurrent sentencing under 924(c) would encompass terms of imprisonment in state court as well as federal court. *United States v. Gonzales*, 520 U.S. 1, 12, 117 S. Ct. 1032, 1038. In the case before this Court, the same Government, acting as Petitioner, urges a far narrower vision of "any other" which would narrow the meaning to: any other "consecutive" sentence; any other "924(c)" sentence; and, the safety valve interpretation, any other sentence for punishment yet to be enacted by Congress. *(United States v. Williams*, 09-466, Petition for Writ of Certiorari, filed October 20, 2009).

Using an expansive interpretation of the words "any other" does not limit the Court's ability to fashion an appropriate sentence-- it only limits the court in its application of mandatory minimum sentences. As the Second Circuit indicated in *Whitley*, "the sentencing judge, although not required to impose a consecutive firearms sentence on top of the [greater mandatory minimum], would retain the authority to do so if appropriate, consistent with 18 U.S.C. § 3553(a)." *United States v. Whitley*, 529 F.3d 150, 158 (2nd Cir. 2008).

These issues are before the Court in *Gould* and *Abbott*, and this petition should be held until this Court renders a decision in those cases.

Respectfully Submitted.



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August 26, 2010